Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Tariff Filing Requirements for Nondominant Common Carriers	)	CC Docket No. 93-36
	)	

COMMENTS OF PACIFIC BELL AND NEVADA BELL

Pacific Bell and Nevada Bell (the Pacific Companies) file these comments in response to the Commission's Notice of Proposed Rulemaking (NPRM).[1] The Commission proposes to "eliminate unnecessary and costly regulations placed upon nondominant carriers by streamlining our tariff filing requirements for such carriers to the maximum extent possible under the Communications Act."[2] Specifically, the Commission would permit such carriers to file, on one day's notice, rates that "may be expressed in a manner of the carrier's choosing and may include ranges or maximums."[3]

One year ago, in their comments in Docket 92-13, the Pacific Companies presented evidence that the Commission's asymmetrical forbearance policy created artificial competition

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[1] Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, Notice of Proposed Rulemaking, FCC 93-103, released February 19, 1993 ("NPRM").

[2] NPRM, App. B.

[3] Id., App. A, p. A-2.

and marketplace distortions.[4] We stated that forbearance would promote efficiency and competition only if it were equally applied to all market participants. By requiring some but not all participants to file tariffs with cost support, the forbearance policy hindered the ability of so-called dominant carriers to respond to competitive offerings of others. We also showed that geographically averaged prices establish price umbrellas under which the non-regulated providers can set their prices even though the true economic prices of all providers may be lower.

Much has happened since then. The Commission has

in some of our most competitive wire centers.[6] Finally, the D.C. Circuit has resoundingly rejected the Commission's interpretation of Section 203 of the Communications Act and reversed the Commission's forbearance or "permissive detariffing" policy.[7]

The Commission's latest proposal does not adequately respond to these events. The tariff filing requirements the Commission now proposes for nondominant carriers ignore the effects of increasing competition and will undercut the Commission's own pro-competitive policies. The Commission asks the wrong question. Instead of asking whether - or where - asymmetrical regulation should continue, the Commission simply asks how to continue it. What we said a year ago is more true today than ever. Streamlined tariff rules may promote competition, but only if the same requirements apply to all providers of competitive services in competitive markets.

I. THE SPREAD OF COMPETITION DEMANDS THE SAME STREAMLINED REGULATION FOR ALL PROVIDERS OF COMPETITIVE SERVICES IN COMPETITIVE MARKETS.

Competition has spread from the interexchange to the local exchange market. The Commission recognized this even before it ordered mandatory collocation in Docket 91-141. Collocation will eliminate any physical advantage the LECs may

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[6] See Reply Comments of Pacific Bell and Nevada Bell, CC Docket No. 91-213, filed March 19, 1993.

[7] American Tel. & Tel. Co. v. FCC, 978 F.2d 727 (D.C. Cir. 1992). See also Tariff Filing Requirements for Interstate Common Carriers, CC Docket No. 92-13, Report and Order, FCC 92-494, released November 25, 1992, appealed sub. nom American Tel. & Tel. Co. v. FCC (Nos. 92-1628, 92-1666 D.C. Cir.).

have in providing access services. Competitors will be able to use our network to gather their own traffic, without helping to pay for the cost of serving high cost areas or indeed any cost at all except for the collocation and interconnection itself. Our own market research shows that even before mandatory collocation, we have lost significant portions of the digital special access markets in portions of Los Angeles and San Francisco that are most attractive to our competitors.

Recent, highly publicized investments in local exchange markets by cable companies, interexchange carriers, competitive access providers, and others make it seem increasingly unlikely that we could influence prices or restrict supply even if we wanted to do so.[8] The rules now proposed by the Commission are based on outmoded assumptions. They need to take notice of reality. As Rep. Edward Markey observed in a recent letter to Commissioner Quello,

> If the market is going to develop along these lines [i.e., as proposed in Dockets 91-141, 91-213, and others], then we must review whether competitors offering telephone services must do so under similar conditions and with similar responsibilities. As you are well aware, telephone companies offer telephone service on a common carrier basis, and have historically been regulated as common carriers. In addition, the principle of universal service has been a cornerstone of public policy for decades. The ability of a potential competitor to pick and choose customers while bearing none of the responsibility for serving less commercially advantageous areas of service appears

[8] See Reply Comments of Pacific Bell and Nevada Bell, CC Docket No. 91-213, filed March 19, 1993.

> deleterious to the long term prospects for robust competition because of the inherent inequity between competing providers.[9]

The Pacific Companies propose that for competitive services in competitive areas, all market participants be subject to the same streamlined tariff rules. There is ample precedent for such market-based streamlining. In Docket 90-132, the Commission streamlined its regulation of most of AT&T's price cap business services and most of its services outside of price cap regulation.[10] Instead of treating AT&T as entirely dominant, the Commission examined the various markets in which AT&T provides services and determined which were or were not competitive. Thus the Commission has already used a market analysis approach for determining the appropriate level of regulation. If a market is competitive, the Commission should treat all market participants similarly within that market.

The asymmetrical regulation that exists today does not promote true competition because it handicaps certain providers. First, competitors use the tariffing process imposed on regulated providers like the LECs to delay LEC offerings. They protest LEC

price in response to the competitors' offerings.[11] Second, tariff requirements based on geographically averaged costs establish price umbrellas under which those competitors can price their services free from competitive price responses by the LECs. Those competitors recognize this and protest LEC price reductions. Only when all competitors are able to provide services and set prices in response to the market will the benefits of competition reach all the customers in a market, fulfilling the Commission's goals and responsibilities.

Some parties may claim that the LECs enjoy unfair advantages by virtue of their universal service obligations and scale economies. This is a dubious claim to make after mandatory collocation, which will in effect offer our competitors all of the supposed advantages of our universal networks but very few of the burdens. It also takes no account of the synergies of providing both intraLATA and interLATA services, which our competitors are permitted to do but we are not. In any case, it is beside the point. As the Commission observed in Docket 90-132:

> The issue is not whether AT&T has advantages, but, if so, why, and whether any such advantages are so great as to preclude the effective functioning of a competitive market. An incumbent firm in virtually any market will have certain advantages --

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[11] See, for example, Petition of Metropolitan Fiber Systems, Inc. to Reject, or Alternatively Suspend and Investigate Proposed Tariff Revisions, Pacific Bell Transmittal No. 1506, filed October 31, 1990; Petition of MFS Communications Co., Inc. to Reject Proposed Tariff Revisions, Pacific Bell Transmittal No. 1607, filed January 25, 1993.

> including, perhaps, resource advantages, scale economies, established relationships with suppliers, ready access to capital, etc. Such advantages do not, however, mean that these markets are not competitive, nor do they mean that it is appropriate for government regulators to deny the incumbent the efficiencies its size confers in order to make it easier for others to compete. Indeed, the competitive process itself is largely about trying to develop one's own advantages, and all firms need not be equal in all respects for this process to work.
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> In short, while AT&T may have certain first-in advantages, no one has shown that these advantages preclude the effective functioning of the business services market. On the contrary, we believe -- and the record confirms -- that competition in business services is thriving, that AT&T's competitors are growing, and that consumers are benefiting from these occurrences.[12]

With mandatory collocation for special access, the market for high capacity private line service, like the market for business services that the Commission examined in Docket 90-132, will be fully competitive in our most profitable areas. Our competitors will be able to use our network to gather their own traffic, at a relatively insignificant cost. Far from being an advantage, our universal service obligations will be a burden that we must bear but our competitors do not. The Commission further noted that "AT&T may, in certain respects, be disadvantaged by its size. For example, it may be more difficult for AT&T to address the individualized needs of some customers or to respond quickly to marketplace changes."[13] This is true of

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[12] Docket 90-132 Report and Order, paras. 60, 61.

[13] Id., n. 100.

the Pacific Companies as well, and its major cause is asymmetrical regulation. The same considerations that led the Commission to streamline regulation for AT&T for some services justify the symmetrical, streamlined regulation of all competitive access services in competitive areas.

The Commission is going about things backwards. The question is not whether asymmetrical regulation promotes competition. As the Commission recognized in Docket 90-312, if a market has multiple suppliers, asymmetrical regulation is unnecessary -- and, we submit, harmful -- unless the incumbent provider has advantages so great that they preclude the effective functioning of competition. The latter will not be the case in the LECs' provision of special access or switched transport when collocation arrangements are available to LEC competitors.

II. THE COMMISSION'S PROPOSAL IS NOT THE BEST WAY TO PROMOTE COMPETITION OR COMPLY WITH THE ACT.

If it really wants to foster competition, the Commission must reconsider its policies in favor of asymmetrical regulation, not reaffirm them. The Commission's proposal simply assumes that asymmetrical regulation promotes competition, then asks how to preserve asymmetrical regulation in light of the D.C. Circuit's reversal of its forbearance policy. Its assumption that asymmetrical regulation promotes competition is nothing more than faulty post hoc, ergo propter hoc logic. The Commission contends that reductions in long distance rates under the forbearance policy "must be attributed in part" to the

forbearance policy.[14] This is unproven and, we submit, untrue. There is no evidence that rates fell because of forbearance. We have demonstrated that in reality, reductions in access charges account for practically all of these long distance rate reductions.[15] The Commission itself has acknowledged, "The single force most responsible for driving down long distance rates over the last several years has been the reduction of access charges long distance companies pay to local exchange carriers."[16]

Similarly, the fact that there are now competing suppliers of local exchange service does not prove that "competition" has benefited from asymmetry, as the Commission suggests.[17] It only proves that unregulated suppliers of local exchange service have benefited. This is no surprise and has nothing to do with "competition". Asymmetrical regulation has created a price umbrella that shelters inefficient suppliers and allows them to extract a premium from consumers. Unless the interests of consumers are completely ignored, this development cannot be called a benefit to competition.

The Commission has never even defined market dominance in a way that would support continued asymmetrical burdens on "dominant" and "nondominant" carriers. It has only said, in

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[14] NPRM, para. 10.

[15] See Reply Comments of Pacific Bell and Nevada Bell, CC Docket No. 92-134, filed October 5, 1993.

[16] Docket 90-132 Report and Order, para. 365.

[17] NPRM, para. 11.

circular fashion, that a nondominant carrier is one it has not declared to be dominant.[18] The Commission did, however, come close to reexamining this distinction in Docket 90-132. In that proceeding, it carefully examined the characteristics of the business services market and decided to exclude AT&T's business services from price cap regulation. As proof points the Commission considered market share and concentration, supply capacity, and the demand elasticity of customers, as well as the relative cost structures and resources of suppliers. After examining these factors, the Commission found the business services market was competitive and allowed AT&T to do business under contract. The Commission took care to observe the requirements of Section 203(a) by requiring AT&T to file tariffs that did not disclose proprietary customer information but specified the rates and terms of these contracts.[19]

The same approach is called for here. Streamlining regulation for nondominant carriers or assuming that "dominant" carriers are "dominant" in all markets, without examining their actual market power in each relevant market, is economically irrational and puts the cart before the horse. The Commission should examine the relative market share, supply capacity, and actual resources of suppliers of local exchange service, and the supply elasticity of each local exchange market. If no one supplier has dominance in a defined market, price cap rules

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[18] NPRM, n.30.

[19] Docket 90-132 Report and Order, para. 121. To promote real competition in the market for local exchange hicap services, the same safeguards would have to apply.

should not apply and all carriers should be permitted to do business with their customers on a customized basis.[20] The requirements of Section 203(a) can be met by filing tariffs summarizing the rates and terms of those contracts, without disclosing customer identities or other competitively sensitive information.

The need for a market-based approach, rather than continued asymmetry that subjects some carriers to full scrutiny while others are allowed to operate in the shadows, is underscored by the filed rate doctrine. As the D.C. Circuit's recent decision reaffirmed, Section 203(a) requires carriers to charge specific filed rates as a condition of offering common carriage. Allowing some carriers to charge rates that are essentially unpublished, while subjecting their competitors' rates to full public scrutiny, could promote the very abuses and discrimination that the filed rate provisions of the Act were intended to prevent.

The Commission's proposal would permit nondominant carriers to file tariffs with either a maximum rate or a range of rates -- "whichever is appropriate."[21] Section 203(a), however, requires carrier-initiated tariffs to show all charges for service and to make no change to such charges except after 120 days' notice.[22] It also says that "no carrier shall (1) charge,

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[20] See Reply Comments of United States Telephone Association, CC Docket No. 91-141, Phase I, filed February 19, 1993.

[21] NPRM, para. 22.

[22] 47 U.S.C. §§203(a), 203(b)(1) (emphasis added).

demand, collect, or receive a greater or less or different compensation ... than the charges specified in the schedule then in effect."[23] The Supreme Court said of the filed rate provisions of the Interstate Commerce Act,

> [The Act] has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.

Armour Packing Co. v. United States, 209 U.S. 56, 81 (1908) (emphasis added).

A wholesale abandonment of this requirement as to some carriers but not others could promote the very unlawful discrimination that Section 203 is supposed to prevent. For example, MFS recently filed a tariff of the "maximum rate" variety that purports to set a maximum monthly rate for DS1 service of $2,100.[24] MFS's tariff also states that "[n]onrecurring charges will be charged on a time and materials basis."[25] At best, MFS's tariff is disingenuous.

The Pacific Companies have interviewed a number of major customers in the Los Angeles and San Francisco areas who obtain service from MFS. These customers reported paying MFS

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[23] 47 U.S.C. §203(c) (emphasis added).

[24] MFS Telecom, Inc., Tariff F.C.C. No. 1, filed February 22, 1993, effective February 23, 1993, §4.1.4.

[25] Id., §4.3.1.

from $200 to $320 per month for DS1 service. If MFS's tariff means what it says, it permits some customers to be charged more than ten times what other customers pay for the same service. Moreover, contrary to this tariff's provisions, some of MFS's customers reported that nonrecurring charges were waived. Others, similarly situated, did pay nonrecurring charges for installation.

It is possible, as the Commission speculates, that unpublished rates promote competition better than filed rates. But if true, this could be accomplished, as it has been in the long distance business services market, by requiring carriers to file specific rates (as Section 203(a) demands) but allowing them to withhold competitively sensitive customer-specific information. At any rate it will take more than just speculation to continue exempting supposedly "non-dominant" carriers, whose dominance or lack of it has never actually been examined, from the filed rate doctrine. Courts have recognized few exceptions to the doctrine. As the Supreme Court said recently of related provisions of the Interstate Commerce Act:

> The duty to file rates with the Commission, ... and the obligation to charge only those rates, ... have always been considered essential to preventing price discrimination and stabilizing rates. "In order to render rates definite and certain, and to prevent discrimination and abuses, the statute require[s] the filing and publishing of tariffs specifying the rates adopted by the carrier, and ma[kes] these the legal rates, that is, those which must be charged to all shippers alike."

Maislin Industries v. Primary Steel, 497 U.S. 116, 111 L.Ed. 2d 94, 108, 110 S. Ct. 2759 (1990) (quoting Arizona Grocery Co. v. Atchison, T. & S. F. R. Co., 284 U.S. 370, 384 (1932)) (first emphasis added; second emphasis in original).

The Commission bears a heavy burden. Its proposed rule will certainly not help render rates definite and certain. We do not believe that allowing selected carriers to charge unpublished rates, while subjecting their competitors to a lengthy tariff review process before they can charge even published rates, promotes the purposes of the Act to such a high degree that it justifies departing from the filed rate doctrine. The balance tips the other way. The doctrine is part and parcel of the Act.[26] Using asymmetrical regulation to foster competition is not.[27] As the Second Circuit observed,

> In enacting Sections 203-05 of the Communications Act, Congress intended a specific scheme for carrier initiated rate revisions. A balance was achieved after a careful compromise. The Commission is not free to circumvent or ignore that balance. Nor may the Commission in effect rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation.[28]

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[26] See Amer. Tel. & Tel. v. FCC, 836 F.2d 1386, 1394 (Starr, C.J., concurring) (D.C. Cir. 1988).

[27] See Phontele, Inc. v. Amer. Tel. & Tel. Co., 664 F.2d 716 (9th Cir. 1981), cert. denied , 459 U.S. 1145.

[28] Amer. Tel. & Tel. Co. v. FCC, 487 F.2d 864, 880 (2nd Cir. 1973).

The proposed rule is similar to the ICC rule that was

The Regular Common Carrier Conference case cannot be reconciled with permitting a carrier-initiated maximum rate or a range of rates that allows one customer to be charged ten times what another similarly situated customer pays for the same service. After a full opportunity for hearing, the Commission may prescribe maximum and minimum rate levels for a carrier under Section 205, but it has not relied on that authority here. The way the proposed rules undermine the filed rate doctrine plainly outweighs the Commission's suggestion that they would "lessen the potential for tacit collusion among carriers by withholding from competitors the exact rate being charged by competitors"[31].

There are better ways to promote competition without straying outside the confines of the Act. We believe customer-specific arrangements, such as the Commission allowed in Docket 90-132, do satisfy Section 203(a) as long as they contain specific rates and all common carriers are required to file them. However, neither competition nor any legitimate purpose of the Act are promoted by requiring only one participant in a competitive market, and not others, to file specific cost-supported rates subject to pre-effective review.

At the very least, if the Commission decides that Section 203(a) of the Act does permit tariffs to be filed with a maximum rate or a range of rates, the ability to file such a non-specific tariff must be extended to all providers of

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[31] NPRM, para. 22.

competitive services.[32] The Commission should also require all providers of special access service to report the number of DS1-equivalent circuits they have installed, by market area.

III. NO SPECIAL EXCEPTION SHOULD BE CARVED OUT FOR WIRELESS CARRIERS.

The Commission has also requested comment on whether nondominant wireless carriers can and should be regulated differently than nondominant carriers generally.[33] The Pacific Companies oppose any attempt to distinguish between carriers that is not firmly based on a market analysis. The Commission should examine the wireless market, as it did the interexchange business services market in Docket 90-132; decide whether customers have a meaningful choice of suppliers; and if they do, regulate all supplies in that market equally.

IV. CONCLUSION.

For the foregoing reasons, the Pacific Companies respectfully oppose adopting rules that would permit nondominant carriers to file tariffs containing a maximum rate or a range of rates on one day's notice. Instead we suggest that streamlined

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[32] Should the Commission determine that its proposed regulatory treatment for "non-dominant" carriers is lawful, Pacific plans to seek such treatment for those markets in which it is "non-dominant".

[33] NPRM, para. 13.

regulation be adopted for all providers of competitive access services in competitive markets.

Respectfully submitted,

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